Empire State Weeklies, Inc. *and* Graphic Communications Conference/International Brotherhood of Teamsters, Local 503. Case 3–CA–26884

October 5, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On May 13, 2009, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party filed answering briefs. The General Counsel filed cross-exceptions and a supporting brief; the Respondent filed an answering brief; and the General Counsel filed a reply brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, as modified below, and to adopt the recommended Order as modified and as set forth in full below.[3]

We adopt the judge's finding that the Respondent's discharge of Ronald Foglia violated Section 8(a)(3) of the Act.[4] We further adopt his finding that the Respondent violated Section 8(a)(1) by unlawfully interrogating Foglia,[5] and unlawfully creating an impression that Foglia's union activities were under surveillance. As explained below, however, we find, contrary to the judge, that the Respondent also violated Section 8(a)(1)

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed __U.S.L.W.__ (U.S. September 11, 2009) (No. 09–328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08–1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09–213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for cert, filed sub nom. *NLRB v. Laurel Baye Healthcare of Lake Lanier, Inc.* __U.S.L.W.__(U.S. September 29, 2009)(No. 09–377).

[2] The judge failed to include commerce facts establishing the Board's jurisdiction over the Respondent. However, we find, as the Respondent admits, that it is a corporation, with an office and place of business in Webster, New York, and has been engaged in the business of commercial printing. Annually, the Respondent, in conducting its business operations described above, purchases and receives at its Webster, New York facility goods valued in excess of $50,000 directly from points outside the State of New York. The Respondent admits, and we find, that it has been an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. We further find that the Union, Graphic Communications Conference/International Brotherhood of Teamsters, Local 503, has been a labor organization within the meaning of Sec. 2(5) of the Act.

[3] We modify the judge's recommended Order to reflect the violations found, to conform to the Board's standard remedial language, and to correct certain inadvertent errors. We also substitute a new notice to conform to the Order as modified.

We also amend the judge's remedy in one respect. His remedy provides for the calculation of backpay in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). The 8(a)(3) violation we find here, however, involved a disruption of employment. Therefore, we calculate backpay in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950). See *Eugene Iovine, Inc.*, 353 NLRB No. 36, slip op. at 1 fn. 4 (2008).

[4] We find it unnecessary to pass on the judge's further finding that Foglia's discharge independently violated Sec. 8(a)(1) because it would not materially affect the remedy.

In adopting the judge's finding that Foglia's discharge violated Sec. 8(a)(3), we agree with the judge that the General Counsel met his initial *Wright Line* burden of proving unlawful motivation for Foglia's discharge. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). Further, we agree with the judge that the Respondent's stated reason for terminating Foglia, his alleged insubordination, was a pretextual one. According to the Respondent, it terminated Foglia for failing to print a job containing the union logo after he was directed to do so. The statements and actions of David Young, the Respondent's owner, however, establish that Foglia's union activity was the actual reason for his discharge. For example, at Foglia's termination interview, Young interrogated him about his union activities and stated that Foglia had been working with the Union for months. Young also admitted that, at the time he discharged Foglia, he harbored "derogatory feelings" towards Foglia for instigating the Union "scenario." After Foglia's discharge, Young questioned other employees about their union sympathies, and even told employee James Foglia (Foglia's son and herein J. Foglia) that because he was a Foglia, he should get the Union out of his head. Further, the Respondent failed to cite insubordination as a basis for Foglia's discharge at the time it discharged Foglia, during its meeting with the Union regarding Foglia, in its position statement, or in its answer to the complaint. Given the pretextual nature of the Respondent's insubordination defense, we find it unnecessary to pass on whether Foglia's refusal to print the job constituted protected concerted activity.

In finding this violation, Member Schaumber does not rely on the Respondent's failure to cite insubordination as a basis for Foglia's discharge at the time of the discharge or in its answer to the complaint. In addition while he agrees with the judge's animus findings, Member Schaumber does not rely on the judge's finding that, if the conversation between J. Foglia and Young had occurred months after Foglia's discharge, it would have made no difference in the animus analysis.

[5] In finding this violation, Member Schaumber relies solely on the fact that the Respondent presented no arguments in support of its exception. Therefore, in accordance with Sec. 102.46(b)(2) of the Board's Rules and Regulations, he disregards that exception and adopts the judge's finding. *Akal Security, Inc.*, 354 NLRB No. 11, slip op. at 1 fn. 1 (2009).

by threatening Foglia's son, J. Foglia, with unspecified reprisals.

Facts

Crediting J. Foglia's testimony, the judge found that upon J. Foglia's return to work from a back injury, Young, the Respondent's owner, called him into his office and discussed J. Foglia's back injury, any work limitations J. Foglia might have, and accommodations the Respondent was making for him. By this time, the Respondent had unlawfully fired J. Foglia's father because of his union activities. Young told J. Foglia to "get this union thing out of your head." When J. Foglia asked how that pertained to him, Young replied, because he was a Foglia.

The parties do not dispute that this conversation happened or the substance of what was said,[6] but rather dispute the specific date on which the conversation occurred. J. Foglia testified that the conversation occurred about September 25, 2008,[7] but he also testified that he was out from work September 22–26. J. Foglia's timecard, however, indicated that he worked on September 23–24. In contrast, Young testified that the conversation occurred after J. Foglia returned to work on October 15. To that end, the Respondent presented a physician's note, dated October 7, excusing J. Foglia from work until "at least 10/15/08."

General Counsel's Motion to Amend

Based on the Young-J. Foglia conversation, the General Counsel initially alleged that Young "told an employee not to talk about unions." After the hearing, the General Counsel moved to amend that allegation to conform it to J. Foglia's testimony. The amended allegation asserted that Young "made an implied threat of unspecified reprisals by telling an employee to 'get this union thing out of your head.'" The judge granted the General Counsel's motion to amend. We find no merit in the Respondent's exception that the issue was not fully litigated and that the finding of a violation deprived the Respondent of due process.

Under Section 102.17 of the Board's Rules and Regulations, a judge has wide discretion to grant motions to amend a complaint. Moreover, if the matter has been fully litigated, and the amendment conforms the complaint to the evidence, the Board has stated that the motion to amend generally should be granted. See, e.g., *Pincus Elevator & Electric Co.*, 308 NLRB 684, 685 (1992), enfd. 998 F.2d 1004 (3d Cir. 1993). Here, the original and amended allegations involve the same individuals, as well as the same conversation, and allege a violation of the same section of the Act. Thus, the Respondent was on notice that the conversation between Young and J. Foglia was at issue. The Respondent had the opportunity to cross-examine J. Foglia during the hearing and it also presented evidence regarding the conversation through its own witness, Young. Accordingly, this issue was fully litigated, and the Respondent does not identify any evidence that it would have presented had it known of the amendment earlier. For all of these reasons, we affirm the judge's decision to grant the General Counsel's motion to amend. See *American Stores Packing Co.*, 277 NLRB 1656, 1656–1657 (1986).

Threat of Unspecified Reprisals

While the judge credited J. Foglia's account of the conversation with Young, and even relied on this account to find that the Respondent harbored animus towards J. Foglia's father because of his union activity, he dismissed this allegation on the ground that the General Counsel failed to establish a "satisfactory foundation" for the alleged threat, apparently referring to the precise date on which the threat occurred. The judge framed the issue as "whether findings of independent 8(a)(1) violations can be based on witness testimony that is not reliable as to the date of their occurrence." He then noted the discrepancies in J. Foglia's testimony regarding the date and found that other records implicitly corroborated Young's testimony as to when the conversation took place. Because the evidence did not "reliably" establish the date of the threat, the judge dismissed the allegation. We find that the judge erred in dismissing the allegation solely because there were minor discrepancies in the witnesses' testimony as to when the conversation, the substance of which is undisputed, actually occurred.[8]

The General Counsel's failure to establish the conversation's exact date does not prevent the Board from finding a violation. The complaint alleges that the conversation took place "on or about" September 24, and the record indicates that it happened between September 25 and October 15. It is undisputed that the litigated conversation is the same as that originally alleged; there is no indication that the date uncertainty caused any party to believe otherwise. Moreover, it is undisputed that the statement alleged to be a violation was made. Under these circumstances, the General Counsel has established a satisfactory foundation for the allegation.

[6] The Respondent does not except to the judge's credibility finding regarding the conversation.

[7] All dates are in 2008.

[8] The dismissed allegation also claimed that Young "made an implied threat to an employee that Respondent would close if employees selected the Union as their representative." No party excepts to the judge's dismissal of that portion of the allegation.

Turning to the merits of the allegation, we find that Young's statement unlawfully coerced J. Foglia. An employer violates Section 8(a)(1) by acts and statements reasonably tending to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *The Continental Group, Inc*., 353 NLRB No. 31, slip op. at 3 (2008). The Board employs a "totality of circumstances" standard to distinguish between employer statements that violate Section 8(a)(1) by explicitly or implicitly threatening employees with loss of benefits or other negative consequences because of their union activity, and employer statements protected by Section 8(c). *Sawgrass Auto Mall*, 353 NLRB No. 40, slip op. at 2 (2008). Here, given the totality of the circumstances, Young's statement was coercive as a threat of unspecified reprisals. The statement by the Respondent's owner followed J. Foglia's father's recent unlawful discharge and would have the natural effect of impermissibly dissuading J. Foglia from engaging in protected activities or run the risk of suffering a fate similar to his father's. Young's statement therefore violated Section 8(a)(1). *See Martech MDI*, 331 NLRB 487, 500 (2000), enfd. 6 Fed. Appx. 14 (D.C. Cir. 2001) (respondent violated Sec. 8(a)(1) of the Act by telling employees they had better stop thinking about the union).

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusion of Law 4(c).

"(c) Threatened J. Foglia with unspecified reprisals for engaging in activities protected by Section 7."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Empire State Weeklies, Inc., Webster, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Graphic Communications Conference/International Brotherhood of Teamsters, Local 503, or any other labor organization.

(b) Coercively interrogating any employee about union support or union activities.

(c) Creating an impression to employees that their union activities are under surveillance.

(d) Threatening employees with unspecified reprisals for engaging in activities protected by Section 7.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Ronald Foglia full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Ronald Foglia whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision, as amended.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Webster, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 22, 2008.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 5, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Graphic Communications Conference/International Brotherhood of Teamsters, Local 503, or any other labor organization.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT create an impression that your union activities are under surveillance.

WE WILL NOT threaten you with unspecified reprisals for engaging in activities protected by Section 7.

WE WILL not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Ronald Foglia full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Ronald Foglia whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Ronald Foglia, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

EMPIRE STATE WEEKLIES, INC.

Linda M. Leslie, Esq., for the General Counsel.

James Holahan, Esq. (Bond, Schoeneck & King, PLLC), of Rochester, New York, for the Respondent.

Daniel Kornfeld, Esq. (Blitman & King LLP), of Syracuse, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. The complaint, issued on December 31, 2008,[1] stems from unfair labor practice (ULP) charges that Graphic Communications Conference/International Brotherhood of Teamsters, Local 503 (the Union) filed against Empire State Weeklies, Inc. (Respondent or ESW), and alleges violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

Pursuant to notice, I conducted a trial in Buffalo, New York, on March 11–12, 2009, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. All parties filed helpful posthearing briefs that I have duly considered.

Issues

Was Ronald Foglia's discharge on September 22 because of his protected activities on behalf of the Union?

Did Respondent's president, David Young, on September 22, unlawfully interrogate Foglia and convey an impression that Foglia's union activities were under surveillance?

Did Young, on about September 24, make coercive statements to James Foglia (hereinafter J. Foglia), Foglia's son?[2]

Witnesses

The General Counsel called Foglia; J. Foglia; Michael Stafford, the Union's president; and Tom Trapp, the Union's secretary/treasurer.

Respondent called Young and employees Lynn Tabak and William Pawluckie. The General Counsel has not alleged that Tabak or Pawluckie were supervisors under Section 2(11) of the Act at any time relevant to this proceeding. Whether they possessed supervisory authority during the week of September 15 – 19 is not a pivotal issue in this case.

On many matters, the testimony of the General Counsel's and Respondent's witnesses was not necessarily contradictory, taking into account natural variations in recall and perspective. In the Facts section, I will address areas in which testimony conflicted, and explain the reasons for my credibility resolutions. I note here the well-established precept that witnesses may be found partially credible: "'[N]othing is more common in all kinds of judicial decisions than to believe some and not all' of a witness' testimony." *Jerry Ryce Builders, Inc.*, 352 NLRB 1262, 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). Rather, in evaluating its plausibility, a witness' testimony is appropriately weighed with the evidence as a whole. *Golden Hours Convalescent Hospitals*,

[1] All dates are in 2008, unless otherwise indicated.

[2] Relating to this allegation, the General Counsel made a posthearing motion to amend the complaint. I will address this further in the Facts section.

182 NLRB 796, 798–799 (1970).

Facts

Based on the entire record, including testimony, my observations of witness' demeanor, documents, and stipulations, I find the following.

Respondent, a corporation with an office and place of business in Webster, New York, is engaged in the business of commercial printing. Board jurisdiction has been admitted, and I so find.

Young is Respondent's president and sole owner. He regularly participates in operations at the facility, which employs approximately 10 employees.

ESW is comprised of three departments: art/office, press, and bindery. Tabak and two others work in the art/office department. At times relevant, the press department had about four employees, including Foglia and J. Foglia; and the bindery department had two to three, including Pawlucki and Joseph Foglia, another son of Foglia.

ESW leases space in its facility to Max Printing (MP), which occupies an area in the center of the building that is essentially surrounded by ESW workspace.[3] A wide, open doorway separates the MP work area from the ESW print shop.[4]

Wayne McCrossen, MP's owner, employs Glen McCrossen (G. McCrossen), his nephew, at the premises. For many years, ESW and MP regularly contracted with one another to do respective customers' print jobs, depending on the type of printing equipment required. MP has represented about 7–8 percent of ESW's gross annual revenues. Most of ESW's work for MP consisted of printing campaign literature in the fall season.

MP has been signatory to a labor agreement with the Union and, by virtue of that relationship, has had union authorization to put the union "bug" or logo on the materials it prints. Customers may require the logo because it shows that a union shop did the job. ESW used MP's union logo on work it performed for MP for MP's customers.

At all times pertinent, Respondent had four presses in operation, three located in the main pressroom, and the fourth situated in a larger room that served as a combination bindery area/pressroom.

Foglia's Discharge

Young hired Foglia in approximately December 1992, and the latter worked continuously for him as a press operator for almost 16 years prior to his discharge. At all times relevant, he worked on the four-color press located in the main printing area.

Respondent has not contended, in its December 15 position statement to the Region, answer to the complaint, or posthearing brief, that Foglia's work performance or other conduct on the job preceding September 18 played any role in Young's decision to discharge him.

A. Foglia's Union Activities

In approximately June, Foglia obtained the Union's phone number from G. McCrossen, called, and spoke with Trapp. The two met about 2 weeks later at a food court, on Foglia's lunch hour. Trapp discussed the benefits to Respondent's employees of having union representation, including more work as a result of ESW receiving the right to use the union logo. Foglia replied that he already printed with it. Trapp responded that ESW, as a nonunion shop, should not be using the logo, and he asked Foglia to notify him the next time this occurred.

Subsequently, Foglia had numerous phone conversations with Trapp, on the former's breaks or lunch hours.[5] In them, Foglia provided Trapp with contact information for other employees.

During this time period, Foglia frequently spoke to his two sons, and he also talked to press operators Karl Leippe and Shawn Pink, about the benefits the Union offered and whether they were interested in representation.

In approximately August, McCrossen came up to Young in the facility's parking lot and stated that G. McCrossen had said Foglia was "talking with the Union."[6]

B. Events of September 17–18

Young went on a scheduled vacation from September 11–22. Before he left, Tabak requested that he remind Foglia that in his absence, she was in charge of scheduling print jobs. Young did so.

During the week of September 15, Foglia was scheduled to print the Pontiac Club of America book (Pontiac job), which ESW prints on a monthly basis. It was at least a 40-hour job. On September 15, McCrossen told Tabak that he needed ESW to print a job as soon as possible (the MP job). Tabak assigned it to Foglia, stating that it should take priority over his Pontiac job.

Foglia first ran the MP job on Tuesday, September 16, as reflected in Respondent's Exhibit 2, a press sheet consisting of four pages (two fronts and two back). It was a "political postcard" or campaign literature for a Democratic candidate for a county position and contained MP's union logo.

On the morning of September 17, Foglia called Trapp and told him that Respondent was about to run the union label again that afternoon. Trapp responded that he had other commitments and could not come then. Foglia said that he could put it on the following morning, and Trapp replied that he would be there. After this conversation, Foglia told Tabak that he would put the job on the first thing the next morning.

The following morning, Stafford and Trapp arrived at the facility. In light of the above, I find disingenuous Stafford's testimony that he did not know whom Foglia was at the time. The same holds true for his testimony that the purpose of their visit related to speaking with McCrossen about contract revisions and that he happened to come upon an employee running a job with the union logo. In this regard, neither Trapp nor Stafford called to make an appointment with McCrossen, who was not even there that morning.

Stafford and Trapp first spoke with G. McCrossen. Afterward, they approached the four-color press on which Foglia

[3] See Jt. Exh. 2, a diagram.

[4] See R. Exh. 4, a photograph.

[5] See Jt. Exh. 1, a stipulated listing of phone calls that Foglia made or received from Trapp, from June 26 on.

[6] Tr. 462.

was running the MP job. Stafford told Foglia that ESW was not a union shop, that he was not supposed to be running the job, and to stop. He asked who was in charge. Foglia pointed to Pawluckie and continued with the job.

Stafford and Trapp went over to Pawluckie. Stafford asked if he was in charge and said that Respondent could not print the job. Pawluckie responded that Young was in charge but was on vacation.

Pawluckie went over to Foglia, who was still running the MP job. Pawluckie either "suggested" (Pawluckie) or "insisted" (Foglia) that Foglia stop the job until Tabak was aware of what was going on. Foglia did so. The difference in their characterization is immaterial because Respondent does not contend that Foglia acted improperly at that point.

In finding facts in the events that follow, I give the greatest weight to Tabak's testimony and credit it where it differed from that of other witnesses. Tabak testified in detail and with a seemingly good recall, and she did not appear to make deliberate efforts to skew her testimony in Respondent's favor. In this regard, I note that her testimony did not fully corroborate Young's.

After speaking with Foglia, Pawluckie proceeded to Tabak's office, where he told her what had occurred. She followed him out to the pressroom. Foglia's press was not running. She asked what had happened. He replied that two union men had come up and told him that he could not run the job because of the union label.

Tabak next went to the MP shop, where Stafford and Trapp were talking to G. McCrossen. Stafford had the press sheet in his hand, waved it in front of her face, and said that ESW could not print it because it had the union logo. She responded that neither Young nor McCrossen were there and that ESW was printing the job it was hired to do. Stafford inquired if she would print counterfeit money if asked. G. McCrossen suggested that everyone calm down, saying that he had called McCrossen. He further suggested that Stafford and Trapp leave and that McCrossen would call them when he came in. Before they left, Tabak asked them for some kind of identification, and Stafford gave her his business card.[7]

After that, Tabak spoke with McCrossen about the MP job and then returned to the four-color press. The MP job was still loaded, but Foglia was standing there. She asked if he had pulled the MP job from the press yet. He said no, and she told him to go ahead and finish it.

Tabak left and came back about 10–15 minutes later. Foglia was talking to Pink, and the press was not running. She heard Foglia mention McCrossen's name and asked him if he wanted to speak with McCrossen, who was on his way. Foglia said no, "I'm just questioning your authority."[8] She asked, her authority for what. He replied, "To tell me to print this job."[9]

Tabak stated that she had talked to McCrossen by phone, and he wanted his job finished.

Foglia responded that he did not care what McCrossen said because McCrossen was not his boss. She again asked him to finish the job.

About 10–15 minutes later, Tabak was at a computer with a direct view of the four-color press. She went over and saw that it was still not running. Foglia was still standing by the press but was not engaged in any work activity. She made the decision at that point that the press should be operating rather than idle, and she told him that if he was not comfortable doing the MP job, to go ahead and put the Pontiac job back on. He did so. There is no evidence that any other employees' work was disrupted that morning.

At the facility on Sunday afternoon, September 21, Tabak and Young discussed the events of September 18. She also related that on September 17, Foglia had come to her and said he was going to print the MP job the following morning. By his own testimony, Young construed as union activity what he heard about Foglia's conduct. Thus, in response to the Charging Party's counsel's question of when he knew of Foglia's union activity, Young mentioned that his summer conversation with McCrossen was the "only information that I knew until I met with Lynn Tabak on [September 21]."[10]

Young testified that he discussed with Tabak the impact on ESW of not being able to continue to print for MP. However, she mentioned nothing about this, testifying that in response to her recitation of what had taken place, he simply stated that he would think about it.

Young further testified that before he made a final decision to terminate Foglia, he wanted to speak with McCrossen "to get more information on what had transpired on [September 18]."[11[Yet, McCrossen was not even present at the facility during the events in question, so he had no first-hand knowledge thereof.

The following day, Young spoke with McCrossen, who stated that Respondent had lost four printing jobs from MP on September 19 because the Union was watching over him. He added that Respondent would probably not be able to do any political work for MP that year. Young testified that he decided to discharge Foglia after speaking with McCrossen.

Respondent did not complete the MP job and was not able to invoice McCrossen for any of the work done. The approximate invoice value was $1500, and the cost of materials and other items used was about $800. Although Young testified that the reason the MP job was not finished was Foglia's refusal to print it, he also testified, inconsistently, that another person could have operated the necessary press and that there was time to print the job after the refusal.

C. Events of September 22

When Foglia came in to work that morning, he saw that his work notes and Stafford's business card that had been on his desk since September 18 were missing. At about 9:30 a.m., Young approached and asked to see him in his office.

Their respective versions of the discharge interview that took place differed greatly, especially on what Young said about the Union. In resolving this credibility matter in Foglia's favor, I find it significant that Young admittedly asked each of the other four shop employees, one-by-one, almost immediately after he

[7] See CP Exh. 1.
[8] Tr. 384.
[9] Ibid.
[10] Tr. 462.
[11] Tr. 447.

discharged Foglia, "if they had an interest in having a union."[12] Revealing, too, was Young's testimony that at the time he discharged Foglia, he had derogatory feelings about him because he had refused to do the job for Tabak after having been specifically told to follow her instructions, and also "the fact . . . that he had instigated the whole scenario with the union people coming in."[13] I find as follows.

When they arrived in Young's office, Foglia asked about his notes and the business card. Young responded, "What's going on with this union?"[14] Foglia replied that Stafford had left his business card and that he (Foglia) had wanted a better education on why he should not print the union logo and had gotten it. Young then stated that Foglia had been working with the union for months. Foglia asked where he had heard that, and Young answered, "I have my sources." Foglia asked who, and Young replied that he could not tell him. Foglia denied it.

Young went on to say that he had just lost an $180,000 contract because of it, MP was in "deep shit," and in no way, shape, or form would the Union be formed in ESW. Young next stated that he needed Foglia's letter of resignation by the end of the day. Foglia said he (Young) could not do that, Young asked why not, and Foglia responded, "Fuck you. I'm out of here now."[15] He left at that point.

Even if Young's account is credited over Foglia's, Young indicated that the discharge went beyond Foglia's conduct in refusing to finish the MP printing job. Thus, according to Young, when Foglia came into his office, Foglia said that he bet this had something to do with the two union guys, and Young gave the rather contradictory response, "No, it really doesn't, but in a way, it does," and then went on to explain the cost of losing the particular MP job and other MP jobs.[16] Respondent's position statement relates that Young told Foglia that his services were terminated "because of the substantial loss of printing business in the first half of 2007 [sic] and the anticipation of a reduction of printing work from Max Printing."[17] These were the same reasons advanced for Foglia's termination in the September 22 letter that Young prepared at Foglia's request.

Between about 9:30 and 11 a.m., Young spoke to each of the four shop employees on an individual basis and asked whether they were interested in having a union. They all said no.[18] Although Young testified that he spoke to the employees probably in the midafternoon, about 4—5 hours after he discharged Foglia, I credit the testimony of Stafford and Trapp that Young mentioned his questioning of employees at their meeting with him at about 11 a.m. In this regard, the chronology set out in Respondent's position statement also has Young's questioning of employees preceding his meeting with Stafford and Trapp "[l]ater that morning."[19]

After hearing of Foglia's discharge, Stafford and Trapp came to the facility at about 11 a.m. and asked McCrossen to set up a meeting between them and Young. McCrossen did so. After introductions in Young's office, McCrossen left.

The versions of Young vis-à-vis Stafford, and Trapp of what was said at their meeting were consistent in many respects. To the extent they differed, I credit Stafford and Trapp, whose accounts were quite similar but not identical (for example, on how the meeting ended), and find the following facts.

Stafford and/or Trapp stated that reinstatement of Foglia was necessary before any other arrangements could be made between ESW and the Union. Young replied that he would not reinstate Foglia because he had brought employees back in the past, and they had not worked out. He also alluded to Foglia's "mood" problems and said that he should have fired him earlier. They explained the advantages that Young would receive if ESW became a union shop, including health care and retirement benefits, and the ability to use the union logo. He asked if he could be an affiliate or associate member and have his employees pay an association fee but not be union members, in order to be able to use the union logo. In this regard, he said that he had gone around and asked everybody if they wanted to join a union, and nobody did; they were happy with the status quo. Stafford stated that he did not believe such an arrangement was possible but would look into it.

Young's Statements to James Foglia

J. Foglia (hereinafter Foglia in this section) was employed from September 2002 until his discharge in approximately February 2009. ULP charges regarding the discharge were pending at the time of the trial. I draw no inferences on his credibility from those facts. I have taken into account that he would have a natural tendency to testify favorably to his father. Nevertheless, he appeared to be forthright, albeit somewhat nervous, during his testimony, which was detailed as far as the pertinent conversation he had with Young.

As noted earlier, the General Counsel made a posthearing motion, dated April 9, 2009 (all dates in this paragraph are in 2009), to amend paragraph VI(b) of the complaint, the allegation pertaining to Young's statements to Foglia, to conform to Foglia's testimony,[20][22] and a memorandum of the same date in support of said motion. Respondent then filed a request to extend the time for filing briefs for at least 2 weeks "to review and respond to this motion." The General Counsel next filed a motion in opposition to Respondent's request to extend time to file briefs. By order dated April 15, Chief Administrative Law Judge Robert A. Giannasi referred both motions to me, and by order of the same date, I deferred a ruling on the General Counsel's motion to amend, and denied Respondent's motion to

[12] Tr. 448. For reasons stated infra, I find that he interrogated them between about 9:30 and 11 a.m. that day.

[13] Tr. 465—466.

[14] Tr. 268.

[15] Ibid.

[16] Tr. 424.

[17] GC Exh. 4 at 1.

[18] The General Counsel does not allege any such questioning as a violation of the Act. Par. VI(a)(1) of the complaint speaks of interrogation of "an employee about the employee's union membership . . . ;" referring to Foglia. As to par. VI(a)(2), which refers to creating an impression of surveillance "among its employees," no evidence of such is in the record pertaining to employees other than Foglia.

[19] GC Exh. 4 at 2.

[20] To change "Told an employee not to talk about unions" to "Made an implied threat of unspecified reprisals by telling an employee to 'get this union thing out of your head.'"

postpone the filing of briefs. As I noted therein, this matter is also the subject of a 10(j) proceeding in Federal District Court, making time of the essence in the issuance of my decision.

In addressing this issue, I am compelled to analogize it to the proverbial tempest in a teapot. Suffice to say, the amendment is merely a partial rephrasing of an existing allegation to reflect Foglia's testimony, Respondent had a full opportunity to rebut that testimony during its case in chief, and I see absolutely no prejudice to Respondent in allowing it. Accordingly, I grant the General's Counsel's motion to amend. See *Payless Drug Stores*, 313 NLRB 1220, 1220–1221 (1994); *Pincus Elevator & Electric Co.*, 308 NLRB 684, 684–685 (1992), enfd. mem 998 F.2d 1004 (3d Cir. 1993).

Foglia testified about a conversation he had with Young on about September 25 (a Thursday), upon his return to work after being off for 1 week due to a back injury. He specifically testified that he was out the week that his father was terminated (September 22–26), inconsistent with a September 25 conversation and with his timecard for the week ending September 28, showing that he worked on September 23–24.[21] He never offered an explanation for these inconsistencies. On the other hand, Respondent provided a physician's note dated October 7, excusing J. Foglia from work until "at least 10/15/08."[22] Possibly, he may have been out more than once for a week-period during the relevant timeframe, but speculation cannot substitute for evidence.

J. Foglia testified that he was at his press at about 8–8:15 a.m. on the day of the conversation, when Young asked him to come to his office. There, Young discussed Foglia's back injury, limitations he might have, and accommodations Respondent was making for him. Young went on to state that the company was legally performing the jobs it was doing and would continue to do so. He told Foglia to "get this union thing out of your head."[23][25] Foglia asked how that pertained to him, and Young replied, because he was a Foglia. He went on to say that ESW was not doing well and that everyone needed to pull together to get out of the slump.

Young did not specifically address the statements attributed to him by Foglia at a September 25 meeting. According to Young, they had a conversation after Foglia returned to work on October 15, following leave due to his back injury. They discussed his back condition and his ability to perform his duties. He mentioned Foglia's absenteeism and that with today's economy, everyone had to pull together.

I do not believe that Foglia fabricated his account of what Young said in the conversation, and I find it consistent with other evidence of record, including Young's own testimony. I therefore credit it as far as content only because, for the reasons stated earlier, there is a foundational problem in establishing the date.

Analysis

The framework for analyzing alleged violations of Section 8(a)(3) is *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). This analysis also applies to alleged discrimination for protected concerted activity under Section 8(a)(1) when employer motivation is at issue. *Benjamin Franklin Plumbing*, 352 NLRB 525 (2008); *General Motors Corp.*, 347 NLRB No. 67 slip op. 3 at fn. 3 (2006) (not published in the bound volume).

Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

Under *Wright Line*, if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of such activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Serrano Painting*, 332 NLRB 1363, 1366 (2000); *Best Plumbing Supply*, 310 NLRB 143 (1993). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting*, supra at 1366, citing *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for the employer's actions are either false or not in fact relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. *SPO Good-Nite Inn, LLC,* 352 NLRB 268, 269 (2008). On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 323, 223 (D.C. Cir. 2006).

Conceptually, Foglia's conduct can be bifurcated: seeking union representation starting in about June, and arranging the Union's arrival on September 18 to confirm what it considered Respondent's improper use of the union logo.

As to the first, Foglia contacted the Union about organizing Respondent's employees, and he spoke to several of them regarding the benefits of becoming unionized and whether they would be interested in supporting the Union. This conduct was clearly protected activity under Section 8(a)(3).

Regarding the second, Foglia on September 17–18 notified the Union that he was running a job with the union logo and offered to postpone the job until the following morning so that the Union could be present. The case most on point, cited in all counsels' briefs, is *Circle Bindery*, 218 NLRB 861, 861–862 (1975), enfd. 536 F.2d 447, 452 (1st Cir. 1976). Therein, the

[21] GC Exh. 6.
[22] R. Exh. 6.
[23] Tr. 203.

Board held protected under Section 8(a)(3) an employee's efforts to bring to a labor organization's attention a nonunion company's use of the union logo licensed to a unionized employer. As the Board stated, "To the extent a licensee [here, MP] . . . violates its agreement with a union . . . union members are deprived of work contractually reserved to them." 218 NLRB at 862.

Respondent points out in its brief (at 14) that the employee in *Circle Bindery* was a union member, unlike Foglia, and avers that his conduct was therefore not concerted. I do not consider this distinction significant. Nor does the fact that Foglia's conduct may have inured directly to the benefit of employees of other companies make it any less protected. As the Supreme Court has held, Section 2(3)'s provision that the term "employee . . . shall not be limited to the employees of a particular employer unless the Act explicitly states otherwise" was "intended to protect employees when they engage in otherwise protected activities in support of employees of employers other than their own." *Eastex, Inc. v. NLRB*, 437 U.S. 563, 564–565 (1978). See also *Coca Cola Bottling Co. of Buffalo v. NLRB*, 811 F.2d 82, 87 (2d Cir. 1988); *Misericordia Hospital Medical Center v. NLRB*, 623 F.2d 808, 812, 815 fn. 8 (2d Cir. 1980).

Based on the above, I conclude that this conduct of Foglia also constituted union activity within the meaning of Section 8(a)(3).

Since the General Counsel alternatively alleges that Foglia's conduct regarding the logo came under Section 8(a)(1) protected concerted activity, I will address that matter, in particular, the necessary element of "concerted." The Supreme Court has also held that "[T]he language of §7 does not confine itself to situations where two or more employees are working together at the same time and the same place toward a common goal, or to situations where a lone employee intends to induce group activity or acts as a representative of at least one other employee." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 822–823 (1984). In that case, the Court held that a lone employee's refusal to drive what he deemed an unsafe vehicle, based on his invocation of a right under the collective-bargaining agreement, constituted concerted activity because it affected the rights of all employees under the agreement. I therefore conclude that the General Counsel has established the necessary element of "concerted" and that Foglia's actions constituted protected concerted activity.

Respondent argues that Foglia was "disloyal" and his conduct removed from protection because he arranged to meet with Trapp so that he would be "caught" printing the MP job, and because he precipitated the "workplace disruption" on September 18.[24] Regardless of whether one agrees or disagrees with the course of action the Union took, the fact remains that Foglia's efforts to assist the Union in determining if a nonunionized company was improperly using the union logo was protected activity, as the cases above establish. Nor does the record show a "workplace disruption," there being no evidence that any other employees ceased work. I will address Foglia's conduct with Tabak when discussing Respondent's defenses.

Turning to knowledge of Foglia's protected activity, Young admittedly heard from McClendon in August that Foglia was "talking with the union." His testimony reflected that he considered the events of September 18 also to be union activity on Foglia's part. In the discharge interview on September 22, Young brought up Foglia's union activities, including what had occurred on September 18. Accordingly, I conclude that the element of knowledge has been established by direct evidence.

As to the element of animus, Young admitted that when he discharged Foglia, he had derogatory feelings about him because "he had instigated the whole scenario with the union people coming in." Animus also can be inferred from the following. First, Young stated at the beginning of the termination interview that Foglia had been working for the Union for months, and, later in the meeting, that ESW would never have a union. Second, almost immediately after the interview, Young went around and questioned employees about their union sympathies. Third, in Young's September or October conversation with J. Foglia, Young stated that the company was legally performing the jobs it was doing and would continue to do so, told J. Foglia to "get this union thing out of your head" and, when J. Foglia asked how that pertained to him, replied because he was a Foglia. These statements obviously referred to Foglia and his union activities. Thus, animus has been shown.

Foglia's discharge, at which Young cited his union activities, satisfies the final necessary element (action), and I therefore conclude that the General Counsel has established a prima facie case of unlawful termination.

Had Respondent timely raised Foglia's insubordination to Tabak on September 18 as a reason for the discharge, I would treat this case as one as one of dual motivation since "It is axiomatic that an employer may lawfully take appropriate action, including discipline and discharge, to address an employee's insubordination." *Amerisino Markets Group, LLC*, 351 NLRB 1055, 1056 (2007). See *Oaktree Capital Management , LLC*, 353 NLRB No. 127, slip op. at 1 (2009) (cursing at a coworker a legitimate ground for discipline that raised need for dual-motivation analysis).

However, Young did not cite "insubordination" as a basis for Foglia's discharge either at the time he discharged Foglia or in his meeting with Stafford and Trapp when they sought his reinstatement. Neither was insubordination mentioned in Respondents position statement to the Region, or even in Respondent's answer to the complaint. Respondent's 11th-hour interjection of "insubordination" as a new reason leads to the inference that it is a mere pretext and to the applicability of the doctrine holding that shifting reasons advanced by an employer undermine their credence. See *Abbey's Transportation Services v. NLRB*, 837 F.2d 575, 581 (2d Cir. 1988); *Tracer Protection Services,* 328 NLRB 734, 734 (1999); *Scientific Ecology Group, Inc.*, 317 NLRB 329, 329 (1995).

I note that even had insubordination been timely raised as a defense, I would have to conclude that the punishment of discharge for this one instance of insubordination by a 16-year employee raises a red flag that the discharge was based on unarticulated unlawful reasons rather than the one cited. See *Detroit Paneling Systems, Inc.*, 330 NLRB 1170 (2000); *Neptune Water Meter Co. v. NLRB*, 551 F.2d 568, 570 (4th Cir. 1977).

Regardless of whether a pretext or dual-motive standard is

[24] R. Br. at 16.

applied, Respondent faces a fundamental problem: Young's statements and actions, as well as his testimony about his state of mind at the time he discharged Foglia, show that Foglia's protected activities were the major motivating reason for Foglia's discharge. At the termination interview, Young interrogated Foglia about his union activities and stated that Foglia had been working for the Union for months. Almost immediately after the interview, he went around and questioned employees about their union sympathies, and in a later conversation with J. Foglia, he implicitly referenced the union logo matter and essentially told him that he should not be prounion like his father. Moreover, Young testified that at the time he discharged Foglia, he harbored animosity toward him for having instigated the Union coming into the facility.

Even Young's statements that Foglia was terminated because of a reduction of printing work from MP indirectly related to Foglia's protected activity regarding the logo, since the loss of that work resulted directly from the Union's pressure on McClendon not to continue to allow ESW to use MP's union logo.

In this regard, Respondent could not lawfully discipline Foglia because of its loss of MP business due to MP's obligations to the Union with respect to the union logo. See *Circle Bindery*, supra at 862. In affirming the Board in that case, the First Circuit Court of Appeals held (535 F.2d at 452) that "[c]oncerted activity that is otherwise proper does not lose its protected status simply because it is prejudicial to the employer." In *Misericordia Hospital Medical Center,* supra at 815, the Second Circuit Court of Appeals cited this language with approval and added, "To hold otherwise would be to render meaningless the rights guaranteed to employees by Section 7." The Court in *Circle Bindery* noted that any economic loss the nonunion employer suffered was a result of losing union-label work that it was not entitled to perform in the first place. Ibid at 453 fn. 7. Such was the situation here.

In sum, I conclude that Respondent's defenses were either legally invalid or pretexts and that Foglia was discharged on September 22 because of his protected activity on behalf of the Union. The discharge therefore violated Section 8(a)(3) and (1) of the Act.

Independent Violations of Section 8(a)(1)

I start with Young's statements to Foglia at the September 22 discharge meeting in Young's office. In response to Foglia's question about the union business card that was missing from his desk, Young asked, "What's going on with this union?" After Foglia responded that he had wanted a better education on why ESW should not use the union log, Young replied that he (Foglia) had been working with the Union for months. When Foglia asked where he heard that, Young replied, "I have my sources" and refused to provide further information. Young proceeded to tell Foglia that he was being terminated.

The above statements were clearly coercive, and I conclude that Young violated Section 8(a)(1) by (1) interrogating Foglia about his union membership, activities, and sympathies and, (2) creating an impression that Foglia's union activities were under surveillance.

I turn to J. Foglia's account of a conversation he had with Young in which the latter made certain statements pertaining to the Union. I do credit him that at some point the conversation occurred and am mindful that I found Young's statements therein to reflect animus toward Foglia because of his union activity. However, for such purpose, the date of the conversation is not critical; whether it occurred on about September 25 (J. Foglia), October 15 (Young), or even months after Foglia's discharge would make no difference.

Here, I address whether findings of independent 8(a)(1) violations can be based on witness testimony that is not reliable as to the date of their occurrence. Both J. Foglia and Young testified about one conversation in which they discussed the former's back condition, so presumably they were referring to the same conversation, despite their differing accounts of what was said about the Union. J. Foglia testified that he had the conversation on about September 25, after being out for a back injury for a week, the week that his father was terminated. Yet, his father was terminated on September 22, and time records show that J. Foglia worked on September 23–24. He never offered an explanation for these discrepancies. Furthermore, other records implicitly corroborate Young's testimony that they had this conversation on October 15.

Section 10(b) of the Act, 29 U.S.C. § 160(b), and Section 102.39 of the Board's Rules and Regulations provide that ULP proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States."
This reflects the status of ULP hearings as formal legal proceedings under the Administrative Procedures Act of 1946 (APA), 5 U.S.C. §§ 511–599. See also *Federal Maritime Commission v. South Carolina*, 535 U.S. 743, 756–757 (2002); *Butz v. Economou*, 438 U.S. 478, 513 (1978). Section 556(d) of the APA specifically states that except as otherwise provided by statute, the proponent of a rule or order has the burden of proof, consistent with our general jurisprudence.

Accordingly, since the General Counsel failed to establish a satisfactory foundation for the allegations relating to J. Foglia, I recommend their dismissal.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act: Discharged Ronald Foglia because he engaged in protected activities on behalf of the Union.

4. By the following conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act:

(a) Interrogated Foglia about his union membership, activities, and sympathies.

(b) Created an impression that Foglia's union activities were under surveillance.

REMEDY

Because Respondent has engaged in unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Since Respondent discharged Ronald Foglia in violation of Section 8(a)(3) and 8(a)(1), it must offer him reinstatement and make him whole for any loss of earnings and other benefits in accordance with *Ogle Protective Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I deny the General Counsel's request for compound interest, based on the Board's decision in *National Fabco Mfg.*, 352 NLRB No. 37 slip op. at 3 fn. 4 (2008) (not reporte in Board volumes).

ORDER

The Respondent, Empire State Weeklies, Inc., Webster, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise disciplining employees because they engage in activities on behalf of Graphic Communications Conference/International Brotherhood of Teamsters, Local 503, or otherwise engage in protected concerted activities.

(b) Interrogating employees about their union membership, activities, or sympathies.

(c) Creating an impression to employees that their union activities are under surveillance.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights that Section 7 of the Act guarantees to them.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Ronald Foglia full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make employee Ronald Foglia whole for any loss of earnings and other benefits he suffered as a result of his unlawful discharge, in the manner set forth in the remedy section of the decision.

(c) Within 14 days of the Board's Order, remove from its files any references to the September 22, 2008 discharge of Ronald Foglia, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used in any way against him.

(d) Within 14 days after service by the Region, post at its facility in Webster, New York, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since September 22, 2008.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. May 13, 2009.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discipline you for your activities on behalf of Graphic Communications Conference/International Brotherhood of Teamsters, Local 503, or any other labor organization, or otherwise engage in protected concerted activities.

WE WILL NOT interrogate you about your union membership, activities, or sympathies.

WE WILL NOT create an impression that your union activities are under surveillance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act, as set forth at the top of this notice.

WE WILL make Ronald Foglia whole for any loss of pay or other benefits suffered as a result of our discrimination against him.

WE WILL within 14 days from the date of this Order, offer full reinstatement to Ronald Foglia to his former position of employment, or if such a position is no longer available, to a substantially equivalent position, without prejudice to any seniority or other rights and privileges he previously enjoyed.

WE WILL remove from our files any reference to the unlawful discharge of Ronald Foglia, and within 3 days thereafter notify him in writing that this has been done and that the discharge

[25] If this Order is enforced by a judgment of a United States court of appeals, the wordsin the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

will not be used against him in any way. EMPIRE STATE WEEKLIES, INC.